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Choice, charter schools and vouchers

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33
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# CHOICE, CHARTER SCHOOLS AND VOUCHERS

Report to Office of Budget and Program Planning
October 31, 1995

# TABLE OF CONTENTS


I. INTRODUCTION

11. WHAT IS THE PROBLEM?
Table 1: ACT and SAT scores

III. ALTERNATIVES
A. Choice
B. Charter Schools

Table 2: Comparison of SB 370 with alternative accreditation standard

C. Education Vouchers
1. U. S. Constitutional Issues
a. Public purpose
b. Advancing or inhibiting religion
c. Excessive entanglement

2. Montana Law and Constitution

Table 3: Impact of tax credit and deductions for all school age dependents

Table 4: Impact of tax credit and deductions adjusted for dependents in private schools

# CHOICE, CHARTER SCHOOLS AND VOUCHERS

## INTRODUCTION

Application of privatization theory to public education has resulted in a vigorous discussion of vouchers, school choice and charter schools across the nation and Montana is no exception. The 1995 Montana Legislature considered the charter school concept in its deliberations on SB370 and private school tuition tax credits proposed by HB582. Additionally, the enactment of HB544 provided for state assistance to tribal colleges to defray the cost of educating non-beneficiary (Native American) students. This may be the first instance of public payment for education at non-state schools (vouchers) and might be a precedent for support of students attending other private schools.

As Montana evaluates various privatization opportunities and alternatives it is appropriate to look at public education in order for the analysis to be comprehensive. Public education, K-12 comprises 45% of the state general fund budget and higher education comprises another 15% It is important not to exclude education if change can offer viable opportunities for saving public funds without sacrificing education quality and/or improving education.

This analysis is not comprehensive and will not examine every detail and every alternative related to school financing and programs. It is merely intended to be a broad-brush overview of the larger issues. If, as a result of this report, you wish to pursue any of the issues in more detail, then more investigation and analysis will be necessary.

This analysis does not examine privatization of district support services or other functions separately. Individual district boards of trustees would most appropriately conduct the cost/savings analysis for services such as student transportation, maintenance, janitorial and food services, specialty instruction or other programs. For reference, there are some school districts in the midwest and east that have entered into contracts with language schools to provide foreign language instruction within a district that directly provides instruction for all other subject areas. Recently, a Pennsylvania district contracted with a private management firm the operation of an entire school. Several Montana schools currently contract with private providers for transportation, food service and some maintenance. Others also use telecommunication networks to provide certain classes and some of this instruction may originate with private contractors.

## WHAT IS THE PROBLEM?

The underlying premise for this analysis is that alternatives consisting of school choice, vouchers and charter schools are being proposed to solve a problem. Advocates for change are sufficiently dissatisfied with either the quality of learning, teacher output, classroom environment or the cost of schools that they propose varying degrees of change to the status quo. This is not to say that there are not advocates supporting change for other reasons. Some believe competition created by private schools or charter schools will force improvement. The premise being that strong and viable alternatives to public education will reduce a perceived complacency characteristic to public schools that hold a virtual monopoly on education. The competition suggestion was first advocated

in 1955 and is not a new concept.

Others advocate educational alternatives because they believe there is a need for value based education or at least an education where life values, whether founded on religious principles or not, are taught either separately and/or in conjunction with the traditional academic curriculum.

This paper will focus on school choice in the context of addressing specific education issues.

A serious situation that hampers both proponents and opponents of education reform is the lack of comprehensive and reliable data on school/student performance in Montana. Surprisingly, little valuable data has been gathered at the state level that would assist in evaluating performance of students, schools or districts or for making inter-school comparisons. Individual schools and districts may do a good job evaluating, but there is no reliable "big picture" information statewide.

It is incredible that for the largest area of public expenditure there are not fairly sophisticated methods or standards established, quantified and monitored to measure performance. This lack of reliable evaluation data may well be the cause of some dissatisfaction. Without valid data, anecdotal information becomes the basis for policy decisions and may lead to incorrect conclusions.

Attempts to obtain American College Testing Program (ACT) and Scholastic Assessment Test (SAT) scores, by school, have been difficult to obtain because the student test scores of individual schools or districts are not reported to the Superintendent of Public Education or the Montana Board of Public Education. Statewide summary data is available and to some extent provides some comfort that maybe Montana schools are not performing as poorly as some suggest.

Test scores should not be the only measurement tool, but test scores are relevant in that they are one assessment that is applied equally to all students interested in pursuing higher education. A problem with relying on ACT and SAT data for evaluation is that only approximately 58% of the graduating students take the ACT exam and 21% take the SAT exam. Most students taking SAT exams also take ACT exams as well. The effect is that only approximately 60% of the graduating students are tested and they are generally the top 60%, academically. What about the other 40+% not taking the exams or the 7% that are dropping out of school? One wonders how local school boards can assess the performance of their schools year to year and their schools relative to schools in other districts without some common, publicly available measurement device. Some districts are reported to have good testing systems for their schools, but there is little comprehensive data available by which schools can be compared to each other or to established standards.

The attached schedules show the scoring trends of Montana students in national exams since 1987. The ACT exam is more representative, since nearly 60% of the graduating students take the exam. As indicated by comparison to national averages, Montana students are consistently above the average. In recent years, Montana SAT scores rank from the mid-teens to low-twenties of the fifty states. In 1995, Montana students tied for the 6th highest ranking state on the more representative ACT exam.

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## TABLE 1

## MONTANA/NATIONAL ACT* AVERAGE TEST SCORES
## 1987 - 1995

| | 1987 | 1988 | 1989 | 1990 | 1991 | 1992 | 1993 | 1994 | 1995 |
|---|---|---|---|---|---|---|---|---|---|
| Montana Average | 21.7 | 21.7 | 21.6 | 21.6 | 21.6 | 21.7 | 21.6 | 21.8 | 21.8 |
| National Average | 20.8 | 20.8 | 20.6 | 20.6 | 20.6 | 20.6 | 20.7 | 20.8 | 20.8 |
| # of MT Students Taking Test | 5,386 | 5,474 | 5,792 | 5,327 | 5,193 | 5,407 | 5,624 | 5,940 | 6,063 |
| % of MT Students Taking Test | 51% | 51% | 53% | 54% | 55% | 57% | 57% | 59% | 58% |

*ACT maximum score is 36

## MONTANA/NATIONAL SAT** AVERAGE TEST SCORES
## 1987 - 1995

| | 1987 | | 1988 | | 1989 | | 1990 | | 1991 | | 1992 | | 1993 | | 1994 | | 1995 | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | VERBAL | MATH | V | M | V | M | V | M | V | M | V | M | V | M | V | M | V | M |
| MT Average | 479 | 530 | 471 | 529 | 469 | 523 | 464 | 523 | 464 | 518 | 465 | 523 | 459 | 516 | 463 | 523 | 473 | 536 |
| U.S. Average | 430 | 476 | 428 | 476 | 427 | 476 | 424 | 476 | 422 | 474 | 423 | 476 | 424 | 478 | 423 | 479 | 428 | 482 |
| % MT above Nat Ave | | | | | | | | | | | 9.9 | 9.9 | 8.3 | 7.9 | 9.5 | 9.2 | 10.5 | 11.2 |
| # of MT Students Taking Test | | 1834 | | 2139 | | 2170 | | 1978 | | 2060 | | 2150 | | 2234 | | 2191 | | 2273 |
| % of Students Taking Test | | 17% | | 20% | | 20% | | 20% | | 23% | | 23% | | 23% | | 22% | | 21% |
| MT Rank of 51 | | | | | | | | | | | 19 | 14 | 22 | 20 | 19 | 17 | 20 | 15 |

**SAT minimum score 200 - maximum score 800

The Board of Public Education rule on assessment requires all Montana students in 4th, 8th, and 11th grades to be tested each spring. The results of these tests should be compiled and made public to assist local districts and the public to assess school performance. At this time, there are no other measures to rely upon. The present Board of Public Education rule on student assessment (10.56101 ARM) prohibits the Office of Public Instruction or the board from utilizing test scores to compare schools or districts performance in Montana even though the test score data is intended for state to state comparison. Recognizing that standardized test scores alone may not be indicative of the total educational program and that student test scores are only one of several possible indicators of performance they should be made available for policy makers, parents, communities and others to consider.

In a December, 1990 report entitled, Accountability and Quality in Education, the Montana Legislative Council staff reported that Montana is one of only five states without a system of reporting education performance. In 1995 Montana still does not have an accurate or comprehensive measuring device. In the report, the Legislative Council described what should constitute a minimal public school report card.

The report card would include information such as;

(1) student performance by grade and subject area;
(2) student assessment scores on standardized tests;
(3) teacher and administrator attendance;
(4) the total number of teachers, the ratio of the total number of teachers to the total number of students, and a comparison of the ratio to the average ratio for schools of similar size or class;
(5) the total number of administrators, the ratio of the total number of administrators to the total number of students, and a comparison of the ratio to the average ratio for schools of similar size or class;
(6) the total number of non-certified employees, the ratio of the total number of non-certified employees to the total number of students, and a comparison of that ration to the average ratio for schools of similar size or class;
(7) student dropout rate;
(8) the average class size by grade and subject area;
(9) the average number of years of experience of the school's teaching staff and a comparison with the average for schools of similar size or class;
(10) the number of teachers assigned to teach outside their major or minor area of endorsement; and
(11) the amount of general fund spending above or below the average for schools of similar size or class

The above list is not comprehensive and further analysis is probably appropriate.

The Sandia National Laboratories conducted an analysis of education in America at about the same time the Legislative Council study was being conducted. Its report entitled Perspectives on Education in America released in May of 1991 evaluated the U.S. education system performance by considering attendance/dropout rate trends, standardized test performance and trends, college and university data, expenditures and international performance and graduate comparisons plus numerous others. The report concludes that:

* "serious problems do exist in the American education system, however, there is no system-wide crisis"
* "much of the current reform agenda is misguided"
* "progress will only be made by focusing on real, not perceived problems"

The Sandia report emphasizes the importance of collecting and utilizing quality evaluative data and not relying upon unsupported perceptions.

Ultimately parents, communities and the public will determine direction and reform in public schools. However, with no substantive information to document progress or comparability, progress and reform are stymied. By making quality and reliable information available, good decisions and positive changes are much more likely. It is essential these decisions be made through legislation requiring fair, objective, and comprehensive measurement of school and student performance that facilitate interschool comparisons.

## ALTERNATIVES

The NEA Today, (April 1995) reported that in the past 29 years there have been at least nineteen (19) public elections related to school vouchers and choice proposals. The literature seems to focus on urban school systems dealing with these issues although, as we know, the interest is not entirely urban. The North Dakota Legislature debated the issue extensively and California voters rejected vouchers in a nationally profiled election in 1994. Arizona, Colorado and Idaho also considered proposals in recent legislative sessions.

Some have argued that proponents of educational alternatives, for the most part appear to be responding to dissatisfaction with local public education and advocate a solution outside of the existing systems. They seem to be generally responding to school systems which have very high dropout rates, low student performance scores and in some cases schools that reflect the myriad of problems plaguing urban centers. Proponents can be classified as education reformers addressing breakdowns of public school systems, competitive market/privatization advocates or religion/moral based education advocates.

Opponents of school reform generally argue that the fix should be applied to the existing system rather than abandon it. Organized opposition is usually led by school trustees, teachers and administrators and their professional and labor organizations. Most often, the opposition raises both constitutional questions and finances as grounds for rejection as well as challenging the performance of private schools.

Constitutional questions involve First Amendment "Establishment of Religion" arguments while the financial issues center around the impact of providing financial support to those already attending private schools without state support. The Montana debate reflects not only the U. S. Constitution but an almost identical state constitution "Establishment" clause as well as other sections specifically prohibiting aid to sectarian education and to private entities not controlled by the state.

## CHOICE

The concept of choice as applied to public education contemplates that parents or students would self-select their school of preference for whatever reasons were important to them. Such self-selection essentially eliminates the geographic limitations now imposed by district and school attendance areas. Proponents of school choice suggest that if parents (students) were given the opportunity to select their school of choice and had adequate information on school/teacher performance and student attainment that "choice" market forces would improve education overall. The theory is that better quality schools and teachers would draw students while poorer performing schools would lose students.

Theoretically, less capable schools would be identified by declining enrollments and would either improve to meet the competition or be closed for lack of students. Realistically, however, in Montana a number of complications arise with the concept.

In rural areas of Montana "choice" may not be viable because in many instances a single school serves not only the community, but also a large surrounding area. Thus there probably is not really a choice for many families/students without extensive transportation costs either paid directly by the family or as an additional cost for the public system. A criticism of open enrollment "choice" experiments attempted around the country is the additional cost for transportation. Additional complications arise related to how state and local funding is affected when a choice results in attendance at a school outside the student's home district or county boundary. Do state and local tax support follow the student?

In Montana's larger communities, choice may be an option more for elementary students than for high school students. There is evidence in some large school districts that choice is currently being exercised because of apparent flexibility in applying attendance area restrictions.

A prime consideration related to choice and its effect on the current geographical attendance area boundaries is who has first choice for the neighborhood school. Does the student who lives nearby have a preference? Is there some other mechanism such as "first to apply, first selected" used to determine who goes to a particular school? How does choice work when schools are at or near capacity? What is the selection criteria? Do students within established geographic attendance areas have priority?

Critical to any choice is the information upon which preference decisions are based upon. Is there data such as standardized test scores, teacher evaluations, or other evidence of student attainment that will be made available to parents that can serve as the basis of selection? Not at this time.

The literature and opponents of choice suggest that better educated and better informed families would be more proactive and thus more likely to enroll their children in the better school. The central issue here is availability of adequate information to make a decision. I suspect that almost all families would select the better school given equality of information.

Transportation would also be a significant issue affecting choice and one that might well reflect economic status of the families. Without publicly financed transportation, those less able, economically, to provide their own

transportation would likely select the neighborhood school as opposed to a better school at some distance.

In a practical sense, school choice, if limited to public schools, requires fairly large population centers and excess capacity in existing facilities. Sparse population and long distances may diminish school choice options in much of Montana. Limited choice may exist in communities with multiple elementary and high schools but in all likelihood choice would be limited by lack of capacity to accommodate large scale shifting.

Choice currently exists if one considers public, private and home schooling options. Private and home schooling are not supported by public funds which changes the decision from one based upon education quality, proximity to schools and availability of transportation to one that considers educational quality, proximity to schools, availability of transportation, tuition expense, religion and family values.

## CHARTER SCHOOLS

Charter schools have been proposed in Montana as another means of improving academic achievement and controlling costs of public education. Charter schools are in the middle ground between the concepts of choice and vouchers. Most view charter schools as a less extreme change than vouchers that still provides a desirable alternative to school choice proponents.

A universally agreed upon definition of a charter school probably does not exist. Generally a charter school can be described as a school exempt from many of the regulatory standards applied to public schools and whose effectiveness is measured by student performance and achievement. Of the several states that have considered charter school proposals each has unique conditions but common features include charter school agreements approved by state or local boards, independence from most administrative hierarchy, involvement and support of teachers, parents and community, exemption from certain rules and regulations and documentation of improved student performance. Regulation exemptions range from the application of accreditation standards to labor agreement conditions.

Public Charter schools:
-must be non-sectarian;
-are not allowed to violate rules and regulations governing civil rights or health and safety standards
-are not allowed to charge tuition; and
-in most cases, are not allowed to use admission standards

Business Week (April 17, 1995) reported that charter schools, among other alternatives, are being proposed in response to the perception that; a) public schools are failing to provide an education that meets fundamental competency expectations, b) public schools are unsafe for children, c) the product of the U.S. education system will be unable to compete in the global economy; and d) money is being wasted within the current educational system.

The Sandia study referenced earlier disagrees and concludes that overall public schools are meeting fundamental competency expectations and that U.S. students can compete in the global economy.

Many believe that competition for students will promote educational improvement and creativity - at least on a small scale that can be eventually incorporated into the system at large. Charter schools would provide a certain level of competition. They are not intended to remain isolated enclaves with special educational emphasis. But they are intended to be the laboratory that incubates improved education techniques and philosophies that are subsequently applied throughout a district or state.

Educators, parents, administrators and observers conclude that certain regulations applied to public schools are burdensome, costly, and at times stifle the creativity that is necessary for schools to respond to the student's needs. Additional administration necessitated by such requirements draws resources away from direct student education. Charter schools can escape those regulations considered superfluous and focus otherwise diverted resources on direct student contact.

The educational emphasis of the charter school can be customized to meet documented academic needs in a community. Some schools are designed to emphasize the arts, while others specialize in math, science, or students who need remedial academic assistance. Charter schools should not be confused with magnet schools whose purpose is often focused on a narrowly defined subject area. There is probably no limit to the variety of charter school designs that can be developed. However, most charter schools are designed to teach traditional subject matter with emphasis on interdisciplinary instruction and college preparatory material.

The Denver-based Education Commission of the States, and The Center for School Change at the University of Minnesota's Humphrey Institute of Public Affairs recently completed a survey of all existing or planned charter schools in the United States. One question in the survey attempted to determine the academic focus of the schools. The responses are ranked as follows with the #1 rank representing the most often stated educational emphasis. The figure (xx) in parenthesis indicates the number of responses by category.

1) integrated curriculum/interdisciplinary studies (67)
2) technology (47)
3) back to basics (36)
4) civics (35)
5) arts (33)
6) sciences (29)
7) college preparatory (27)
8) other (25)
9) gifted and talented (15)
10) vocational (14)

The concern that charter schools will result in elite, specialty schools seems to be unfounded, given the limited history of charter schools to date. Most appear to be focused on traditional academic subjects utilizing interdisciplinary concepts and technology. Additionally, several of the schools further refine their emphasis by providing traditional subjects to under-achieving or troubled students.

During the 1995 Legislative Session a charter school proposal (SB370) was advanced by the Montana School Boards Association, passed by the Senate, and ultimately died in House committee. As originally drafted, SB370 would allow ten (10) schools in Montana to pilot the charter school concept. These schools could have been exempted from district policies, rules of the Board of Public Education including accreditation standards, collective bargaining law as well as laws relative to length of school year, Saturday and Sunday classes and basic instruction/accreditation standards. The stated purpose in the bill was to create a school with an atmosphere which fostered pupil progress, educational creativity, professional growth, freedom from conventional educational restraints and mandates, including collective bargaining provisions.

A reading of the amended version of SB370 before it finally failed reveals that the bill was amended to protect collective bargaining agreement provisions related to working conditions and increased the role that teachers had in the establishment of charter schools.

In May, 1995, following SB370's demise and the end of the 1995 Legislative Session, the Montana Board of Public Education adopted new and revised school accreditation standards and procedures. Included in the revision is an amendment to the accreditation alternative standard Rule 10.55.604 ("the exemption rule"). The 1989 version of the rule provided the local board of trustees the opportunity to obtain "permission to use an alternative to any standard, section of standards, or the entire set of standards, excluding standards that pertain to law or certification requirements." The new rule maintains the intent of the 1989 rule but allows a school or district to submit a plan to employ a performance based accreditation process for approval. If approved, a school district could virtually establish a charter school or charter district not too dissimilar to that contemplated by SB370.

The original (1989) rule has not been utilized to date apparantly due to lack of support, promotion and training by the Board of Public Education and the Office of Public Instruction. The State Board of Public Education is now directing its staff to assist in the development of guidelines for local districts to follow implementing the performance based process.

It is possible that the debate over the issue of charter schools in Montana may be made moot by this rule, but fine tuning may be required as problems surface through implementation. An often heard criticism of both SB370 and 10.55.604 ARM is the requirement for local district approval. Some advocate that a state board or entity should be the approving authority because local boards and administrators favor the status quo and see "charter schools" as a challenge to their authority. Others argue that collective bargaining agreements and law are the source of the problem in that they tie the hands of the local boards when considering more flexible education alternatives. Utilization of the exemption rule should be monitored. If the exemption rule continues to be ignored charter school legislation should be reconsidered.

Table 2 is a comparison of the key provisions of SB370 and rule 10.55.604. The comparison reveals that local boards of trustees are able to create what is essentially a charter school if they have teacher, community and bargaining unit support.

## TABLE 2

## COMPARISON OF CHARTER SCHOOL BILL SB370 WITH ALTERNATIVE ACCREDITATION STANDARD (MONTANA ADMINISTRATIVE RULE 10.55.604)

| SB370 | RULE 10.55.604 |
|---|---|
| Board of Public Education to implement school rules as an alternative means of providing public educational opportunities as part of its authority over public schools | Rule 10.55.604 provides a procedure to obtain exemption from any and all accreditation standards except certification requirements and law |
| petition required to Board of Public Education from school district or school employee, group, or public entity or person through local trustees | application required to Board of Public Education through Office of Public Instruction from local school (would need local trustee approval) |
| defines charter school as non-sectarian, operated under charter granted by trustees and approved by the Board of Public Education | no definition but allows alternative standards for schools as long as learner goals are the core of instruction |
| **PURPOSE OF SCHOOLS:**<br>-improve learning<br>-improve student learning<br>-improve learning opportunities in special areas<br>-creative and innovative instruction and structure<br>-professional vistas for teachers are improved<br>-freedom from program constraints and mandates | |
| **OPERATION OF SCHOOLS**<br>-charter school operates under local trustees, but independent from other district programs | -a school authorized an exception operates under local trustees |

| CONDITIONS FOR CHARTER | CONDITIONS FOR EXEMPTION |
|---|---|
| -description of key elements of the school | -that the curriculum core is the accreditation standards learner goals and assessment criteria |
| -community, employee, and parent interest and support | |
| -necessity and rationale for waivers of district policy | -limited to Board of Education accreditation standards |
| -Board of Public Education rules and law (length of school year, teaching days, instructional program and accreditation standards) | |
| -waivers may include accreditation standards or certain requirements of law | -exemption includes all accreditation standards except except those required by law |
| -local trustees shall determine necessity for and approve policy waivers and application to Board of Public Education for rule waivers if majority of affected teachers agree | -local trustees shall apply for exception |
| -trustees and teachers may jointly renegotiate labor contract to address provisions impacting the application and operation of charter school | -governed by law (Title 39, MCA) |
| -approval by Board of Public Education is effective the next year | -permission granted for ensuing year, renewable for five years |
| -ten (10) schools - maximum in state | -no limit - 900 schools in Montana |
| | -performance based process for accreditation may be authorized for districts meeting established criteria |

| | |
|---|---|
| **OPERATION OF SCHOOL** | |
| -under control of trustees but independent from other district programs | -under control of trustees |
| **EMPLOYEE RIGHTS** | |
| -may participate in TRS or PRS if otherwise eligible | -governed by law (Title 19, MCA) |
| -be paid as other district employees | |
| -retain collective bargaining or contract rights | |
| -retain tenure rights | |
| -satisfy certification requirements | -yes |
| **REVIEW AND RENEWAL OF CHARTER** | |
| -charter is valid for up to 3 years | -waiver renewable for 5 years |
| -trustees shall annually evaluate results and report to Board of | -yes, after pilot (first) year annual reports, accreditation and public education team evaluation |
| **REVOCATION** | |
| -charter can be revoked by Board of Public Education if: | |
| -school violates laws not waived | -if school violates law |
| -material violation of charter | -yes |
| -charter can be canceled by trustees after notice to affected parties at end of school year or at any other time | -waiver can be canceled at any time if educational program is found to be unsound by the Board Board of Public Education |
| **OPI DUTIES** | |
| -provide technical advice to the Board of Public Education and trustees regarding charter schools | |
| **SCHOOL YEAR** | |
| -180 days of instruction not necessarily required | -180 days required by law (20-1-301, MCA) |

| | |
|---|---|
| **SCHOOL DAY** | |
| -charter schools exempted from traditional school day<br>-charter school could operate on Saturday and Sunday | -hours of daily instruction required by law (20-1-302, MCA)<br>-not without OPI authorization law (20-1-303, MCA) |
| **INSTRUCTION** | |
| -charter school may be exempt from the Board of Public Education's basic instructional program | -same, but must meet learner goals |
| **PERFORMANCE BASED ACCREDITATION PROCESS** | |
| | -must incorporate<br>-student/community profile<br>-mission statement reflecting local philosophy of education<br>-exit performance standards<br>-analysis of organizational and instructional effectiveness<br>-development of a school improvement plan |

## EDUCATION VOUCHERS

The most significant proposal for school reform is education vouchers. Vouchers are essentially an I.O.U. from the state to pay some or all of a student's education expense and can be issued to either the student directly or to a school on behalf of the student. One central issue is whether vouchers utilized for education at sectarian schools are constitutional. Additional policy issues also arise regarding voucher payment for education at non-sectarian private schools, but these issues do not involve the first amendment to the U.S. Constitution.

HB544 authorized the Commissioner of Higher Education to pay the cost of education for non-beneficiary students attending tribal community colleges. Teachers unions and those in the educational system generally oppose vouchers on the basis that diversion of some funding to private schools will begin to destroy the financial base of the public school system. Proponents advance the theory that competition for students will be the catalyst for improvement in public and private schools. However, there is little reliable data to support either contention.

In 1955 Milton Friedman first suggested educational vouchers in an article entitled, The Role of Government in Education, published in Economics and the Public Interest. Friedman suggested each family be given a fixed payment per child to be used at the family's choice of schools, either private or public, sectarian or non-sectarian. The concept anticipates that the competition for students engendered by the vouchers would result in greater efficiency of operation and improved course offerings to meet the expectations of students and their families.

Resistance to this theory came quickly as southern states considered manipulating the voucher concept to enable white families to send their children to segregated private schools. The racial segregation issue diverted attention from the original intent of the idea. Racial segregation might not be as volatile an issue now since passage of civil rights legislation but opponents continue to characterize vouchers as a means of establishing class separation based on family finances, socio-economic status and race.

Teacher's unions still oppose vouchers for the stated reason that diversion of public funds would initiate the demise of public education by diverting tax revenue to private schools that now is devoted to public education. It would seem, however, that public schools would only be in peril, if, after vouchers were enacted, they were unable to maintain educational quality.

Another argument against vouchers is the same that is raised concerning school choice: that parents would not be able to make rational decisions concerning the education of their children. Proponents counter by showing that parents already make this choice by choosing where to live. Some parents even pay the cost of those decisions through personal transportation expenses and out of district tuition supplements.

Proponents argue that vouchers enable poorer families to choose better schools in spite of the fact that they might not be able to live in the most desirable neighborhood. That would only be the case, however, if vouchers covered full educational costs. A voucher whose value was less than the tuition and fees of a private school would necessitate the difference to be paid by the student's family. To ensure that economic segregation of students does not occur when vouchers do not cover the total cost of education, add-ons or tuition supplements could be income adjusted. Only in that manner would equality of educational opportunity exist.

While all of the above makes for good theoretical discussion what does it mean in the practical sense for Montana?

The biggest problem is a constitutional question because in Montana the private school options for which vouchers could be applied are nearly all sectarian. Seventy-eight of ninety-seven private schools identified in 1994-95 Directory of Montana Schools appear, by their name, to be of sectarian orientation. Approximately 7,158 students attend these schools from grades K-12; 87% of the total private school enrollment. These figures do not consider home school enrollment of 2,331 students.

Realistically, vouchers for students attending the seventy-eight sectarian schools would have to stand the test of legal challenges related to the "establishment clause" of the first amendment to the U.S. Constitution.

## U. S. CONSTITUTIONAL ISSUES

Although there have been a number of U. S. Supreme Court decisions on matters relating to the clause, ("Congress shall make no law respecting and establishment of religion, or prohibiting the free exercise thereof...") court observers think decisions are not entirely definitive and some uncertainty remains concerning several aspects of public support for students attending private, sectarian schools. A recent article in The Columbia Journal of Law and Social Problems (summer 1995) entitled Educational Vouchers; a Constitutional Analysis by Michael J. Stick, provides excellent background on the constitutionality of vouchers.

Court challenges related to the Establishment Clause are analyzed under a three prong test advanced in the U. S. Supreme Court's decision in Lemon v. Kurtzman, 403 R.S. 602 (1971). To be constitutional, a law providing state aid to students:

1) must have a secular legislative purpose;
2) must neither advance nor inhibit religion; and
3) must not result in excessive government entanglement with religion.

A statute that fails any one of the above three-prong tests violates the Establishment Clause and is unconstitutional.

## PUBLIC PURPOSE

Proponents of voucher proposals state that the intent and result of vouchers would be an improvement in overall education for all students because public schools, as well as sectarian schools, become more efficient and demand oriented. They believe this argument to be conclusive for "secular purpose" and would satisfy the first prong of the Lemon v. Kurtzman test.

Many federal court observers believe that the court would have had little difficulty in finding a secular purpose in most cases before it and would have little difficulty finding secular purpose even if a voucher program included sectarian schools.

## ADVANCING OR INHIBITING RELIGION

A more difficult test is the standard to neither advance nor inhibit religion. The U. S. Supreme Court has not set a clear standard for this analysis and has, as a result, made inconsistent decisions. Through a series of cases the court has held that:

* A New York law that required local public school authorities to lend textbooks free of charge to all students in public and private schools (grades 7-12) was not in conflict with the Establishment Clause because the benefit flowed to children and families and not the schools and this did not advance or inhibit religion. Board of Education v. Allen, 392 U.S. 236 (1968).

* A Pennsylvania law which provided direct loans to non-public schools of instructional material and equipment was found to violate the Establishment Clause for all equipment and materials except textbooks. The court distinguished textbooks from other equipment as the books were loaned to the students. Meek v. Pittenger, 421 U. S. 349 (1975).

* An Ohio law authorizing the provision of material and equipment to the students or parents as well as public funding for field trips was, except for textbooks, found to violate the constitution. Wolman v. Walter, 433 U. S. 229 (1977). Transportation for field trips was distinguished from general transportation to and from school, the funding for which was earlier judged legal in a New Jersey case, Everson v. Board of Education, 330 U. S. 1 (1947) in Wolman the funding for field trip travel and scheduling was unconstitutional because it was under the control of religious institutions.

* A Minnesota law providing tax deductions to parents for education expenses at any non-profit, (sectarian or secular) or public school, was constitutional even though the benefit flowed primarily to parents of children attending private, sectarian schools, Mueller v. Allen, 463 U. S. 388 (1983).

* A similar New York statute that provided partial tuition reimbursement and tax credits to low income families that sent their children to private schools was held to violate the Establishment Clause. In this case the court examined not only the legislature's intent, but ultimate effect relative to advancing religion. Committee for Public Education and Religious Liberty v. Nyquist, 413 U. S. 756 (1973).

* Another alternative method of public support for private schools was attempted in a case where the Grand Rapids School District leased classrooms from a private school to provide secular classroom instruction. The court recognized that the ultimate effect was government indirectly aiding religion by supporting the financial burden of a private school's more secular responsibilities. In this case the court looked beyond the language of the state law that purported to apply the assistance to non-public schools and determined that nearly all of the schools benefiting were sectarian. The court ruled the subsidy in violation of the Establishment Clause. School District of the City of Grand Rapids v. Ball, 473 U. S. 373 (1985).

* A Washington student using state vocational education funds to pay for his education as a minister at a religious school provided a new angle for the court's review. Effectively, the vocational education funds worked like a voucher to pay the cost of education. The court ruled this type of payment did not conflict with the Establishment

Clause because funding went to the individual and the individual made the choice of school and a significant portion of public funds were not flowing to secular institutions, Witters v. Washington Dept. of Services for the Blind, 474 U. S. 481 (1986).

Some legal scholars argue that the Witter's decision and an interpretation of the intent of concurring justices may well allow vouchers even if a significant portion of the proceeds flows to sectarian schools. Such a proposal would require that individuals would receive payment directly and make the choice of an educational institution.

As can be determined from the above decisions there is no definitive standard that can be easily used to determine whether a voucher/tax deduction/support proposal would pass court challenge under the Establishment Clause.

It is probable that a direct payment of public funds to a sectarian school or for financial support that comes under the control of the sectarian schools would be judged in violation of the Establishment Clause. It is less certain how payments to individuals that flow predominately to sectarian schools would be judged.

An alternative program/proposal where public funds flowed first to the individual and applied to a very broad range of recipients might pass the court's test. Secular textbooks provided directly to the students might also pass scrutiny under the second prong of the Lemon v. Kurtzman test.

One possibility might be a tax credit or deduction for any out of pocket expenses incurred by a family for education. Such a program would need to apply to all families with school age children no matter what type of school they attend in order to meet the broad base application referred to by the court.

## EXCESSIVE ENTANGLEMENT

The third test used by the court is whether the public funding causes excessive government entanglement with religion. There are two types of entanglement: administrative, which relates to state involvement monitoring the use of public funds; and political divisiveness, which is government action promoting political differences, based upon religion.

This third prong of the Lemon v. Kurtzman test, diverges from the idea of actively promoting a religious purpose to merely getting involved in a religious institution's operation. Even government monitoring of programs or financial review of a sectarian school's records to ensure public funds were spent correctly would probably constitute administrative entanglement.

A voucher or other support program that operated with expenditure limits or controls that necessitated monitoring by the state would also most likely fail the excessive entanglement test. Tax deductions or tax credits to individuals may likely avoid an excessive entanglement challenge.

The U. S. Supreme Court's decisions are not conclusive enough to give one a great degree of certainty in predicting the outcome of any court challenge, but they can provide general guidance toward determining whether state support of sectarian education proposal would pass the test of constitutionality. It seems likely, for state support to be judged constitutional, it must:

1) have a viable secular purpose
2) be directed to the individual student or family
3) apply to a broad base of citizens
4) not flow disproportionately to sectarian institutions and;
5) must be general enough in application that financial monitoring by the state is not required

While there is no definitive test other than the three prongs identified in Lemon v. Kurtzman, it does appear that the court has established a precedent of looking through the stated purpose of various support proposals to their ultimate effect. Decisions in Committee v. Nyquist and Grand Rapids School District v. Ball reflect the more thorough examination of effect and support the conclusion that the court would continue looking to ultimate effect. As a result, any voucher/tax credit proposal in Montana would have to be designed to pass such scrutiny.

## MONTANA LAW AND CONSTITUTION

Article II Section 5 of the Montana Constitution is literally identical to the Establishment Clause of the first amendment to the U. S. Constitution. Therefore, the preceding U. S. Supreme Court analysis is applicable to similar tests in state court.

Additionally, Article X, Section 6 of the Montana Constitution is even more explicit in its prohibition of financial aid to sectarian schools. Paragraph 1 of section 6, states; "The legislature, counties, cities, town, school district, and public corporations, shall not make any direct or indirect appropriation or payment from any public fund or monies, or any grant of land or other property for any sectarian purpose or to aid any church, school, academy, seminary, college, or university, or other literary or scientific institution controlled in whole or in part by any church, sect or denomination."

Because Article X, section 6 is so specific regarding appropriations and expenditures as aid to sectarian schools, it seems to open the door to challenges not mentioned in the discussion on the federal constitution.

Article X, section 6 focuses entirely on a specific act providing aid through state or local government funds or by transfer of state or local government land or property, to any entity controlled, in any manner, by a church, sect or denomination. Because they are not specifically mentioned in section 6, tax deductions or credits for costs incurred by students at sectarian institutions may be constitutional. Funds that are eligible for a tax deduction or credit, would by definition, never have been part of "a fund, monies or property of a state or local government" and would not require a government act to disburse the funds. If this is correct, one could conclude that tax credits/deductions that met the criteria enumerated earlier would pass a Montana Constitutional challenge under Articles II and X.

HB582 of the 1995 Legislative Session was designed to provide refundable tax credit for tuition and fees paid

by families sending children to private schools; initially a $375 credit in FY95 and rising to $1000 by FY97.

Had the bill passed, it quite probably would have been judged unconstitutional under the second prong of Lemon v. Kurtzman. Even though the bill provided tax credit for "private" school expenditures, the fact remains that 87% of the reported private school students attend sectarian institutions. If tax credits follow students the majority of benefits would flow to sectarian schools. More importantly however, is the refundable concept embodied in the bill. The fact that the state would pay back to taxpayers amounts of the credit in excess of their tax liability would most likely create a conflict with Article X Section 6.

If one were to propose an educational tax credit or deduction program for tuition and fees that met constitutional standards then the decrease in revenues to state and local budgets would have to be considered. The tables below show the reduction in income tax revenue that would result if a tax credit or deduction was available to all families having educational expenses. These tables anticipate that not only parents of students in private schools, but also parents of students in public schools experience out of pocket expenses for education. At a minimum, many public school families pay expenses such as activity fees.

Tables 3 and 4 provide for various levels of tax credit/deductions for analytical purposes only with no specific recommendation. As designed, the tables provide a tool to consider revenue impact from credits limited to $50 through $200 and deductions from a $100 to $1000 maximum. For example: If a credit was allowed with a $50 maximum limit the corresponding reduction of state income tax revenue would be $6,465,000 with an average credit claimed of $42.25.

## TABLE 3

**Impact of Alternative School Credit and Deduction on Individual Income Tax Liabilities Tax Year 1993; Full-Year Residents**

### Impact of Tax Credit

| Credit Amount | Average Credit | Impact When Adjusted to School Age Dependents |
|---|---|---|
| 50 | $42.25 | $(6,465,000) |
| 75 | 61.67 | (9,435,000) |
| 100 | 80.17 | (12,265,500) |
| 125 | 97.98 | (14,991,000) |
| 150 | 115.02 | (17,598,000) |
| 175 | 131.29 | (20,088,000) |
| 200 | 146.84 | (22,466,250) |

### Impact of Tax Deduction

| Deduction Amount | Average Tax Benefit | Impact When Adjusted to school age dependents |
|---|---|---|
| 100 | $6.00 | $(917,250) |
| 200 | 11.92 | (1,824,000) |
| 300 | 17.79 | (2,721,750) |
| 400 | 23.60 | (3,611,250) |
| 500 | 29.36 | (4,492,500) |
| 600 | 35.07 | (5,365,500) |
| 700 | 40.72 | (6,230,250) |
| 800 | 46.31 | (7,086,000) |
| 900 | 51.86 | (7,934,250) |
| 1,000 | 57.34 | (8,773,500) |

Note: Adjustment to school age children assumes 75% of all dependents claimed are on Department of Revenue tax filings are school age.

If the tax credit or deduction was applicable only to expenditures related to private schools then revenue impact is indicated on the following table 4.

## TABLE 4

**Impact of Alternative School Credit and Dedcution on Individual Income Tax Liabilities Tax Year 1993; Full Year Residents**

**Impact of Tax Credit**

| Credit Amount | Average Credit | Impact When Adjusted To Private School Dependents Only |
|---|---|---|
| 50 | $42.25 | $(348,000) |
| 75 | 61.67 | (507,000) |
| 100 | 80.17 | (659,000) |
| 125 | 97.98 | (805,000) |
| 150 | 115.02 | (945,000) |
| 175 | 131.29 | (1,079,000) |
| 200 | 146.84 | (1,207,000) |
| 300 | 201.90 | (1,659,000) |
| 400 | 247.01 | (2,030,000) |
| 500 | 284.64 | (2,339,000) |
| 600 | 315.90 | (2,596,000) |
| 700 | 342.30 | (2,813,000) |
| 800 | 364.70 | (2,997,000) |
| 900 | 384.15 | (3,157,000) |
| 1,000 | 401.03 | (3,296,000) |

**Impact of Tax Deduction**

| Deduction Amount | Average Tax Benefit | Impact When Adjusted to Private School Dependents Only |
|---|---|---|
| 100 | $6.00 | $(49,000) |
| 200 | 11.92 | (97,970) |
| 300 | 17.79 | (146,000) |
| 400 | 23.60 | (194,000) |
| 500 | 29.36 | (241,000) |
| 600 | 35.07 | (288,000) |
| 700 | 40.72 | (335,000) |
| 800 | 46.31 | (381,000) |
| 900 | 51.86 | (426,000) |
| 1,000 | 57.34 | (471,000) |

Note: Adjustments to school age children assumes 75% of all dependents,(see previous table) are school age. Assumes 8,219 private school students not including an estimated 2,331 home school students.

What is not considered in any of the above tables in the public savings attributed to the 8,219 students are not on the public school rosters. At present average education cost of $3,814 (without transportation) the 8,219 students represent a general fund savings or reduction of $31,349,145 to the cost of public education K-12 in Montana.

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# MEMORANDUM

**TO:** Dave Lewis

**FROM:** Bob Robinson

**SUBJECT:** Education Choice Report

**DATE:** October 31, 1995

Attached is the report on education issues you assigned to me.

The report provides a general briefing on the issues of school choice, charter schools, vouchers and to some extent the education tax credits and deductions. It should not be considered a complete analysis of all education issues.

I suggest it be circulated among interested parties to obtain the comments and perspectives of others before the Governor develops a policy position.

Thank you for giving me the opportunity to prepare the report. I hope it helps focus the decision-making process.

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